UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MARK I. SOKOLOW, et al.,

Plaintiffs,

v. 04 Civ. 397 (GBD)

PALESTINE LIBERATION ORGANIZATION, et al.,

Defendants.

----------x

New York, N.Y.
September 16, 2014
10:40 a.m.

Before:

HON. GEORGE B. DANIELS,

District Judge

APPEARANCES

ARNOLD & PORTER
Attorneys for Plaintiffs
BY: KENT A. YALOWITZ
PHILIP A. HORTON
KEN HASHIMOTO
TAL MACHNES
CARMELA ROMEO
SARA PILDIS

MILLER & CHEVALIER
Attorneys for Defendants
BY: MARK ROCHON
BRIAN HILL
MICHAEL SATIN

(Case called)

MR. YALOWITZ: Good morning, your Honor, Ken Yalowitz from Arnold & Porter on behalf of the plaintiffs. With me are my colleagues: Phil Horton, Ken Hashimoto, Carmela Romeo, Tal Machnes, and Sara Pildis, who is sitting in the audience, by choice, I suppose.

THE COURT: Good morning.

MR. ROCHON: Good morning, your Honor, Mark Rochon on behalf of the defendants. With me are Brian Hill and Michael Satin.

THE COURT: Let me do this. We have what I describe an ambitious schedule for a trial on January 12. I just want to discuss in general some issues, but I have a significant amount of paper to go through before I can give you final decisions on most of these motions. I am going to see if we can address all the issues pretty much on this schedule.

I want to be able to resolve all the outstanding summary judgment motions hopefully by our next conference date, which is November 20, I believe. That's what I am going to concentrate between now and the 20th. I am going to discuss some of the other trial issues today and maybe on the 20th.

But what I'd like to do is the issues with regard to the jury, jury selection, and the motions to sever and bifurcate. I'll discuss it briefly today, but I want to be able to resolve those, and particularly the primary thing is

the dispute over the exhibits and the admissibility of the exhibits. I want to be able to resolve that by December 16 at the latest. And I want to set a conference date, pretrial conference date for that date. And then I want to set a final pretrial conference date the week before the trial, on January 6, so that we can address any other outstanding motions in limine by that time and discuss in more detail, see where we are and where I am with regard to drafts of jury instructions so we will know before that time. If I can address some of those issues earlier than that, I will attempt to do so.

The first thing I need to do is get past the summary judgment motion so we can know what parties and claims are still in the case and then make decisions with regard to the other issues.

I spoke briefly to Magistrate Judge Ellis yesterday. I need to speak to him again. I know that in the list that Mr. Yalowitz submitted about outstanding issues, there is still a sanctions motion. I am going to discuss with him on what schedule he is going to resolve that. I am going to let him resolve that so I can concentrate on the more substantive issues that are related to trial.

I'm in the process of going through the issues on the summary judgment motions. As I said, hopefully I will have that resolved by the 20th.

With regard to some of the issues, let me just give

you, without giving you any firm rulings at this point because I have got to look at the papers further. But with regard to some of the jury issues.

First of all, I don't have a problem doing a jury questionnaire. I have to go through in detail what the nature of the questions the parties are proposing alternatively and, quite frankly, I never found it necessary to do a questionnaire, but I'm willing to do it if the parties want to do it in this case to efficiently select a jury in this case. Some of the issues that have arisen, I think the parties may or may not be the appropriate way to look at that. But the parties are considering this case as if it was a criminal case rather than a civil case, and I am not sure that all of the issues that the parties are raising with regard to concern about the jury are going to be significant issues in this case.

But I do want to think of a process, a total process that will particularly get us a fair jury and protect the jury from any outside interference. Quite frankly, I'm less concerned about the parties. I'm more concerned about things we don't have control over with regard to other interested parties who may decide that they want to observe or attend the trial.

I may decide that an anonymous jury is appropriate. I am not sure I am going to do that. I think I will probably at least think of a process so that the names and addresses of

jurors are not disclosed publicly beyond jury selection and to the parties other than the lawyers and the parties here. I still have to give that some more thought.

It is probably not likely that I am going to put the burden on the jurors to sequester them. I don't have a basis to conclude that that's necessary in this case at this point in time. But I have given thought to different ways to make sure that there is no interference and minimal contact between jurors and outside parties during the trial. Whether or not that is making sure that jurors are escorted in and out or some other more formal process, I haven't completely thought it out yet. But I will probably take some steps to minimize the contact between jurors and the other people who may be have an interest in this case. And what that will entail, at this point I don't know. At this point my inclination is not to sequester this jury, but if I can put in place adequate safeguards to protect the jurors from any outside interference, then I will probably at least take some steps.

I have read the papers on the severance and the bifurcation. I am going to give more thought to that. I can tell you at this point, my inclination is not to do that. But I need to decide the summary judgment motions and figure out who is going to be in this case, what the overlapping proof of witnesses are going to be, whether there is really any efficiency at all or any prejudice with regard to making that

decision.

At this point, I am not sure it's going to take that long. If we are talking about putting aside 10 to 12 weeks of trial, I'm not particularly interested in adding to that burden. I don't have a whole lot of confidence that the bifurcated trial is going to be less time as opposed to more time than a trial on both liability and damages, if necessary. And, obviously, if it's appropriate to sever, I will sever. But, obviously, that's not going to save us time. It is going to add time to separate trials. I'll give those some more thought as I determine the summary judgment motion. I have a pretty good idea, at least my inclination, as I organize what the nature of the proof will be with regard to all of the claims and the plaintiffs. I want to be able to resolve that on or before our meeting in December so we will know. The earlier the better if we need to resolve that.

But at this point I think, as I say, until I rule otherwise, I think all the parties should prepare for a trial with all the parties in it and a trial on both liability and damages. But I wanted to look at the papers more fully in the context of where I think the issues are and the parties, who the parties are to these specific claims.

I am going to try to start putting together at least a draft based on what the parties have given and proposed draft of the jury instructions and get that to you as quickly as

possible. In this case and in several cases, usually, quite frankly, I think it's more useful for me to take a look at that before I make a final decision on that to see if I can draft a verdict form because that's really the guidance.

When you think about it, there are limited issues in this case, very limited issues. As we used to say in criminal cases, this is a whodunit, not a what happened case. The disputed issues are primarily going to be the jury making the determination whether the defendants were involved in the acts that the proof is going to concentrate on. And that's a more discrete issue than if we were trying to determine some factual dispute as to what happened in these incidents.

I think I want to start concentrating on that. I don't know if the parties have given me anything yet as a proposed verdict form.

Did you submit that? I have not gotten it.

MR. YALOWITZ: Your Honor, for plaintiffs we submitted a proposed general verdict and that's our request to the Court. Obviously, it's discretionary. But between all the various claims, I think a general verdict, liable or not liable, and then damages amounts would be the easiest for the jury to deal with. Obviously, it's a discretionary issue.

THE COURT: Is that the defendants' position? Did I receive anything.

MR. HILL: You did not, your Honor. There are so many

moving pieces. What we propose to do is get your rulings on summary judgment, bifurcation, and at that point propose a special verdict form, which I think would be the most efficient. Once we have the instructions, we could key it off the Court's instructions.

MR. YALOWITZ: Just to be clear, your Honor, our view is that a special verdict in this case is a bad idea. We are in favor of a general verdict. And that's the general guidance of the circuit. They like general verdicts, although they are not opposed to special verdicts if they are done right, because it's a process fraught with peril.

THE COURT: I don't disagree with you. The simpler the better. I want the jury to obviously make a clear determination with regard to liability on the part of the defendants. As I say, that's really more a issue of semantics rather than an issue of substantive determinations. We are seeing what language is necessary and what claims of determinations are appropriate for this jury, given, as I say, the limited disputed issues of fact involved in this case.

Most trials, usually most trials, 85 percent of the facts are not in dispute. It's the 10 or 15 percent that the jury has to decide. I want to get that as early and as possible, but it's not likely I am going to get to that before the summary judgment motion. If I can get something to you by or before the 16th of December, I'd like to do that. But I

will give you something that we can at least work with.

It's clear to me, just like every other case that I try, final jury instructions are going to have to ultimately be finalized probably some time during the trial. I want to give you as much guidance beforehand. And if we agree upon the appropriate issues or determination about the jury, I would like that as early as possible. Again, depends on who is in the case what the questions are going to be. So I'll start reviewing that.

I think it would be helpful if some time between soon after the 20th of November, if I can get something proposed, if you want to propose something specifically, if I can get that and consider that between the 20th and December 16, resolve all of those issues by then, it will be good. Because I'm hopeful that we will have minimal issues that will have to be ultimately resolved the week before trial, and we know how the case is going to unfold.

MR. YALOWITZ: Your Honor, if the Court is going to permit the defendants to propose a special verdict, we would really like to get a look at that before the 20th. Obviously, totally within your discretion. I'm just worried that with trial prep and the holidays, if we get something on the eve of the 16th, we won't really won't have adequate time to look at it and react to it.

MR. ROCHON: Your Honor, we would be happy to submit

something seven days after the ruling on the motion for summary judgment.

MR. YALOWITZ: Thank you, your Honor, and thank you, Mr. Rochon.

THE COURT: Obviously, I've got your submissions with regard to the admissibility of trial exhibits. Obviously, it's a painstaking process for me to go through each one of those and determine their relevance and whether or not there is sufficient validation for admissibility. But I am going to try to resolve that as quickly as possible. Hopefully, on the 6th of January we will simply be in a position to sort of refine what decision was in the process and the determinations. But I will give you as much guidance as I possibly have, as early as I can give it to you, given a lot of work that needs to be done between now and then.

That's more so a process more than anything else is really what I wanted to lay out today, given the amount of issues that I have to go through before that time.

Also, I spoke to Magistrate Judge Ellis. I wasn't sure whether or not there were other issues that are before Judge Ellis that I need to emphasize to him.

MR. YALOWITZ: Not that I can think of, your Honor, for the plaintiffs.

THE COURT: The only other more recent issue is the addition of certain exhibits to the joint pretrial order.

Quite frankly, I'm less concerned about whether they are added to the joint pretrial order. I'm more concerned about whether or not they are going to be admitted into evidence at the trial. My view is that if the timing is such that it is not likely, unless some articulation of some prejudice, it is not likely a significant amount of prejudice to the party on that submission. But to the extent that there is or to the extent that those exhibits remain inadmissible or if they are inadmissible, or to the extent that some surprises created some prejudice, I will review that.

I know Magistrate Judge Ellis was making some determinations with regard to certain -- I thought it was with regard to certain exhibits. Maybe it's beyond him at this point.

MR. HILL: During discovery, Magistrate Judge Ellis did rule repeatedly that material not produced during the fact discovery period would not be allowed at trial. That's a portion of our objection, is that a certain amount of material on the plaintiffs' trial exhibit was not produced prior to the close of fact discovery. Your Honor should just enforce that order.

MR. YALOWITZ: There they go again, your Honor. It's not a fair and accurate statement of what happened during discovery and it's not the rule that you have to produce things that are the defendants' own documents that are available from

public sources. We disclosed all of our trial exhibits with many, many months to go before trial. And most of these documents are things the defendants themselves should have produced and didn't.

So the idea that we have to produce documents that are publicly available in order to use them at trial is just not consistent with normal pretrial practice and I don't think there was anything that Judge Ellis said that suggested that. I think what he was saying is, if we want to show medical damages or medical evidence or some documents that are in the plaintiffs' possession, those better be produced and that, of course, makes sense.

THE COURT: My view is a little more focused usually, and I'll talk to Magistrate Judge Ellis and I will get his guidance as to what he intended at the time. My view is usually the first analysis is fairly simple. If it was something that was requested during discovery and wasn't produced in response to that request, then you better have a pretty good reason why you didn't produce it, and it has nothing to do with whether or not it was in their possession or not in their possession. Your response should have been one of three things: I don't have it, I have it and will produce it, or I have it and I won't produce it.

And unless you get one of these three responses, to now say that you have a document that you intend to use at

trial that they were not aware that was in your possession, you are going to have to explain to me how that can be possible if they made a specific request for something that would have been included in the production of these documents, or at least a direct response to that request.

MR. YALOWITZ: I'll give you some examples that at least spring to mind. Frankly, I wasn't here, so I didn't live through the discovery phase. But, for example, the parties exchanged expert reports in 2013. And the expert reports had extensive footnotes with citations to various public source documents as well as documents that had been exchanged earlier in the discovery process.

Mr. Hill sent us a bunch of correspondence. We don't have this document, we don't have that document. So we went and got those for him. Some documents he already had or he was able to find from public sources. By the time he deposed my experts, he had everything he needed or at least he didn't communicate to me that there was something missing. So some of those documents we have listed as trial exhibits. Either we provided them to the experts or we provided them to the defendants during the expert process or, frankly, the defendants already had them. Maybe they exhibited them at depositions.

To come now and say, we didn't produce them with a Bates number on them during fact discovery, that's what the

defendants are saying here and, frankly, it's just more of the same, you know, tried to do whatever they can to avoid having the case tried on the merits. They are not claiming about unfair surprise. They are just trying to get some tactical advantage to keep damaging evidence away from the jury.

THE COURT: My first basic questions are two. I want to know from them whether they requested these documents and I want to know from you what their response was to that request. And if you had those documents and your response was not, we produced those documents to them in response to that request, then I am going to want to know what good reason that if they requested those documents and wanted to know if you had them and would you produce them to them or what other response you gave and why the response was an inaccurate response. Or if you gave no response, what would have been the valid reason for not giving any response when you had the documents and it was likely from the nature of the documents that you would have utilized or intended to utilize those documents at trial.

MR. YALOWITZ: We will have to go through those on a case-by-case basis.

THE COURT: Unfortunately, I'll have to go through those on a case-by-case basis.

Did defense want --

MR. HILL: Your Honor, I am going to note that in the objections that we filed, which I believe is number 544, we

have indicated those particular exhibits that we believe were not produced by the close of fact discovery. I think we used NP as the notation to indicate that. As the Court is reviewing the materials, that's the indication that we objected to that particular ground.

THE COURT: Your objection is why?

MR. HILL: We did ask for these documents during discovery repeatedly and Judge Ellis, as I laid out in the letter dated June 30, which is document 551 on the record, repeatedly told the parties. At one point plaintiffs' counsel even agreed that material that was not produced during fact discovery would not be offered at trial.

THE COURT: I am not sure whether your position with regard to these documents is that you didn't have these documents or were unaware that they were in the plaintiffs' possession, or whether your argument is simply that because they didn't let you know that they had them that you want to keep it out.

MR. HILL: I was not aware that they had them and it's the former of the two choices your Honor gave me. We did not know they gave the documents. We asked for them. We didn't get them until the end of fact discovery --

THE COURT: That's not the first issue. That's the second issue. The first issue is whether or not you had those documents.

MR. HILL: We did not, your Honor.

THE COURT: In your possession.

MR. HILL: We did not and we are not objecting to documents we produced. Just documents that they produced after the close of fact discovery.

THE COURT: Give me an example.

MR. HILL: Your Honor, it's a bunch of stuff, including a bunch of Israeli military court files that the plaintiffs provided to their experts, but never produced to us prior to the close of fact discovery, a bunch of hearsay off the Internet articles, books. When you review the thousand or so exhibits, it's almost entirely hearsay. And almost all of that we got after the close of fact discovery.

THE COURT: Was it the nature of your request that they should have been produced in response to specific requests that you made?

MR. HILL: Not only would you have to produce it automatically under Rule 26(a)(1) if you intended to use it at trial, but we specifically propounded repeated discovery requests for documents related to the plaintiffs' claims, any document the plaintiffs might use at trial, the standard sort of document requests you would expect in a case like this. We propounded them at the beginning of the case, we propounded them at the end of the fact discovery period. And the response we got is, we will produce that, but they didn't produce it

prior to the close of fact discovery, and Judge Ellis has already ruled that they can't use it.

THE COURT: I'll discuss it first in general with Judge Ellis and see if he gives me a position that would simply be a blanket prohibition because of the violation of his order. If not, then I will review the nature of the documents and review the reasons why they weren't produced in the timely manner if they weren't and what the nature and prejudice might be to the defendant, if any, by that production.

MR. YALOWITZ: May I just be heard on just one example. I am not crediting or discrediting Mr. Hill's representation of what he did. I'd have to go back and check, which certainly I will do before just accepting his representation.

But take, for example, these military court files because I do know what happened with those. Those are publicly available. Anybody can go into the courthouse, make an appointment, go into the courthouse and pull the files. We produced during fact discovery, we gathered up the ones that we thought were interesting and important. We produced those during the fact discovery period. We hired an expert on the military court system. He said, I want to see everything. We sent somebody to the courthouse. We pulled everything, we gave it to him. We gave it to the defendants. It wasn't during fact discovery, but in advance of his expert report.

He then issued an expert report. The defendants questioned him using those documents. The defendants produced their own expert report with an expert who had all of those documents. And he rendered his opinions based on the entire court file, not just the selected documents.

So the idea that there is some sort of prejudice here or -- I'm not accepting Mr. Hill's representation that there was some kind of foot fault because I don't think it's our job to go find all of the military court documents for him when he can just as easily send somebody to the courthouse as I can.

THE COURT: But you would agree that you would have a responsibility to produce those documents upon which your expert relied.

MR. YALOWITZ: I agree with that and that's why we did it, without question, right. We provided them to the expert. We provided them to the defense; if not simultaneously, certainly contemporaneously.

THE COURT: There is a category of documents in this category that are documents of these kinds of files that the expert didn't rely upon that you want to admit into evidence.

MR. YALOWITZ: I'm sorry. Say the question again, your Honor.

THE COURT: Is there a category of documents that the expert did not rely upon that you want to now use, admitted into evidence? I am not quite sure --

MR. YALOWITZ: On the military files, on the court files?

THE COURT: Yes.

MR. YALOWITZ: No, no. All the court files were given to both experts. Both experts had them. They are even Bates numbers. But I heard Mr. Hill stand here and tell the Court those should be precluded because I didn't produce them in 2012 or my predecessor didn't produce them in 2012. We waited until 2013, during the expert process.

THE COURT: I see.

MR. YALOWITZ: That's his complaint.

THE COURT: Your position is not that that category of documents were not produced. Your position isn't that they weren't produced. Your position is is that they are complaining that they weren't produced during fact discovery and only produced during expert discovery prior to their deposing the expert.

MR. YALOWITZ: Correct. And I didn't have them during fact discovery. It's not like I was holding back. It's not like the plaintiffs were holding back. It's that the plaintiffs gave the defense what they had. The expert said I wanted more. Expert said I want everything. Plaintiffs gathered everything for the expert, gave everything to the defense, at least everything we could find in the court file.

THE COURT: Is that something that I can determine

based on the papers that I have?

MR. YALOWITZ: I don't think so. I think that the correspondence between the parties and so forth, I don't think there has been a filing on that. I think that's just --

THE COURT: Is that even an argument that you responded in that manner to their objection?

MR. HORTON: It is, your Honor. It is in their response to their motion to strike, Mr. Kaufman, who is the expert at issue. We briefed it there. I don't think we attached every piece of correspondence that might have gone back and forth between the parties. Everything Mr. Yalowitz just said is in our response to our Daubert motion on Mr. Kaufman.

MR. HILL: Your Honor, at the beginning of the discovery process the parties agreed that we were going to bifurcate expert and fact discovery. The rationale of that is when we get to expert discovery, there will be a fixed factual record for the experts to work on. That was made clear to the parties at the outset of the case. That was always Judge Ellis' approach to the case and that's the source, as you'll see in document 551, for his repeated warnings on multiple occasions, that if you are not going to produce something during the fact discovery it's not going to be used at trial. To say that it was produced with the expert materials undercuts the whole rationale for bifurcating two discovery periods.

Let me make another point about military court files. This military court we are talking about is not a court like this. The allocution we witnessed this morning, that doesn't happen at that place. This is in a military prison. It's inaccessible to Palestinians. Our expert, who is an Israeli human rights lawyer, was not allowed to go there --

MR. YALOWITZ: That's a misrepresentation.

THE COURT: Let him finish.

MR. HILL: -- was not allowed to go there and look at the files. The plaintiffs hired someone who is a reserve judge at this military court and that person and the plaintiffs' lawyers were allowed, apparently, to access the files.

Now, we asked for all this material as a factual matter during fact discovery so the record would be fixed. And the plaintiffs gave us some of it, but not all of it. And we have objected to the portion they didn't give during factual discovery.

THE COURT: Is it your position that they were in possession of that material at the time you asked for it?

MR. HILL: My position is that they were in possession, custody, and control. And the control, which is what Rule 34 requires, is demonstrated by their subsequent, as they claim, efforts to go gather it through the expert that they had retained.

THE COURT: How does that make it control?

MR. HILL: Because they could access the materials and we could not. There is another layer here.

THE COURT: That's like saying, I'm in control of the bank's records because I could have asked for them six months ago and I didn't, and so I didn't have them in my possession when you asked me for the bank records. How is that in my control?

MR. HILL: Rule 34 requires a party to produce documents that are in its possession, custody, or control. These plaintiffs, through their lawyers and through their experts, obviously controlled access to these materials.

THE COURT: When you say obviously, but I don't understand how they had control of the Israeli military material, how these individual plaintiffs had control of them.

MR. HILL: They did through their counsel.

THE COURT: How did counsel have control of them?

MR. HILL: This counsel, this organization, Shurat HaDin, which we mentioned in the summary judgment papers, this is an organization that specializes in, among other things, providing tours of this military court. There is a very close relationship between this group of plaintiffs' lawyers and the Israeli government and that is why at this time particularly important.

At the beginning of discovery in this case we requested and Magistrate Judge Ellis issued Hague letters of

request to the government of Israel and that Hague letter which is issued under the auspices of this Court, requested all Israeli government materials that would be pertinent to these cases and to the then known perpetrators.

The Israeli government, upon receiving this Court's request, seeing that it came from the defendants, never honored that request, so we never got access to Israeli government materials. But the plaintiffs' lawyers, who have apparently some connections with the Israeli government, have selectively picked, as Mr. Yalowitz said, the things they think are interesting to produce.

And the Court should be troubled, I think, when a party is using its connections with a foreign government to gain materials on a selective basis and choose just the ones they like to use as evidence at the trial. That's a whole different rationale than why they should have been produced during fact discovery.

MR. YALOWITZ: Your Honor, I can't abide --

THE COURT: Don't interrupt him. I don't let him interrupt you.

I can decipher what's relevant and what's not.

MR. YALOWITZ: Thank you, your Honor.

MR. HILL: You can see where I'm coming from.

THE COURT: I can see partially where you're coming from.

The bottom line is, no, I don't accept the argument, they simply could have asked for it and they would have gotten it makes it in their control if it's not their document. Because the Israeli government could have said to them, we are not going to give you that and you don't know whether the Israeli government has said to them, we are going to give you everything they have with the security concerns and other things.

I don't know what basis that I can determine that somehow documents that are not in their possession or custody or in their control because they are plaintiffs in this case and the Israeli government would look more favorably upon giving documents to advance their case than they would to give you documents to advance your case. I am not sure I know a definition of control that that falls under.

If I want my next-door neighbor to give me something and I'm suing you, just because my next door neighbor says, I might give it to you, but I am not going to give it to them, if I don't have it in my custody or in my possession, I am not sure that puts it in my control that somehow if I had asked for it I would have gotten it so, therefore, I violated the rule of production because I didn't go out and ask my friendly source to give me something that's not in my possession or custody.

MR. HILL: Your Honor, I'm happy to brief it, if you'd like. I do think they were required to produce any documents

they controlled.

THE COURT: I understand that. But you don't give me their control. I don't think that you have a pretty particularly strong argument that these plaintiffs controlled the Israeli government.

MR. HILL: I am not saying they controlled the Israeli government.

THE COURT: I don't know what kind of control you are talking about.

MR. HILL: They controlled the documents that they subsequently produced after the close of fact discovery. That's the only issue. They obviously control things they can produce at a later date.

THE COURT: No. They only control things that they can produce at a later date if they had those things in their possession and custody. Just because they got them later doesn't mean they controlled them before they got them.

MR. HILL: That's what control must mean, your Honor. Otherwise it would mean --

THE COURT: That's not what control means. Control means that you requested it of them and that they should have reasonably been in a situation that they should have responded to you and given you those documents because they have control over the person or entity that has the documents.

Just to say, I asked you for, you didn't have it in

your possession or custody, but you could have asked somebody else for and they probably would have given it to you, that's an argument that you can always make, if you think that somebody might favorably entertain their request. But that doesn't tell me that they have the obligation to make the request on your behalf or make a determination at that time that they are going to get the documents subsequently. If they never got these documents, you wouldn't have that argument.

MR. HILL: That's the issue that's before you. It's not whether Rule 34 was violated in the first instance by the failure to produce. It is whether the failure to timely produce in accordance with the Court's scheduling order and the Court's repeated admonitions that they had to be done by that date merits an exclusion now. We think Rule 37 requires that automatically. We think Judge Ellis' repeated orders to that effect require it now. If you would like us to brief it further on an individual document-by-document basis, we are happy to.

THE COURT: I have to look at it. I am not sure whether or not I need further briefing. As I've indicated, my first review is going to be whether or not this is something that they were in a position to respond to you that, yes, we have it in our custody, possession, or control and we are going to either say we don't have it in our custody, possession or control, or we are going to respond that even though we have it

in our custody, possession, and control, we are not going to give it to you.

If their response was, we don't have it, then we have no obligation to go out and ask somebody who had it to give it to us so we can give it to you. You have to give me a more compelling argument that they had a responsibility to go out at the time that you requested it and get those documents.

What they would have a responsibility to do is that if they subsequently obtained those documents during discovery, at the earliest possible time, after you requested them, they would have had an obligation to turn those documents over to you. But to simply say that there is some obligation, I am not sure where you make the distinction between -- if they had control of the document, they had an obligation to give it to you, whether they subsequently obtained it or not. That's the rule.

So the question is not whether or not they subsequently personally obtained it. The question is, when you requested it, during discovery and at any time during discovery, did they have control over it that they had an obligation, regardless of whether they wanted to produce it later, whether they had an obligation to produce it to you. If they did have an obligation to produce it to you, because it was in their control, then they violated the rule. If they didn't have an obligation to produce it to you at that time, if

they subsequently got a hold of it, because they decided it dawned on them that somebody else may have something that would be useful to them and they decided at that point that they would reasonably request it and the party was friendly to them and decided to give it to them, at that point they had the obligation to immediately give it to you. I am not sure why their subsequent obtaining the document outside of discovery is related to the initial analysis of whether it is in their custody, possession, or control. It's in their possession, custody, or control. They got an obligation to give it to you if you asked for it, whether they got it later or whether they intended to use it. If they violated that rule, then they violated that rule and sanctions are imposed. I don't think it's changed by the fact that subsequently they asked for it and got it.

I'll review it. I'll look at the nature of the documents and the nature of, as I say, if Judge Ellis gives me the impression that he had set down a clear bright line rule on this and that the parties understood that the consequences of violating that rule would be preclusion, and he says this is a violation of that rule, then I'll first consider that. But if he doesn't say it that way, then I am going to review what it is that you received, when you received it, whether or not there is a basis to argue that you should have received it early and what was the prejudice to you in not receiving it, if

you did not receive it in a timely manner. I'll start with that analysis. As I say, I am sure we will discuss it further once I more completely look at the documents and the arguments and get more informed with regard to the nature of the arguments.

Is there anything else you wanted to add?

MR. YALOWITZ: No. I think your Honor has captured it well. I would just throw into the mix of things that the Court would have to consider the defendants' own diligence in pursuing or not pursuing public source information.

THE COURT: Unless you can give me a strong likelihood that if they had asked the Israeli government for it, the Israeli government would have kindly turned it over to them, I am not sure that I have much of an analysis to go through.

MR. YALOWITZ: I have to go back and look at the depositions. But he and I talked about that issue. And my recollection is that he expressed --

THE COURT: He who?

MR. YALOWITZ: This is Michael Sfard. He is the defendants' expert. My recollection is he said -- he's a prominent kind. He would be like a Kuntsler or Kuby or something like that, well known over there. And he said for him to get access, he has had in the past to have to go bring an injunction at the high court to get in there. I said, how hard is it to do that. He said it's a small fee and they let

me do it. I have to see what the deposition said about that. But I don't think that he would have had any trouble getting in there.

The other thing is, there is evidence in the record in this case that the defendants' top security people have quite a close cooperative relationship these days with the government of Israel on security issues. And, frankly, I don't think that had they used their internal sources to go to the government of Israel and say, our lawyers are having trouble getting these court documents. I don't think they would have had a problem, but I have to look and see what Sfard said on that issue.

THE COURT: If I were to determine that those documents were in your possession, custody, or control, that your argument would not be that, well, they could have gone and got a court injunction to try to get these documents and, therefore, we didn't have an obligation to give it to them when they asked for it.

MR. YALOWITZ: My focus would be on the factors that the Second Circuit tells us to look at, which is the reason for the delay in production, prejudice to the defendants. There is a four-factor test and so that what I'm saying might flow into the mix of prejudice. But I think, frankly, the prejudice issue here is dispositive because they have the documents well before they deposed my expert, well before their expert issued a report. I think we have --

THE COURT: Was this issue raised at the time that you produced the documents?

MR. YALOWITZ: Not that I can recall. The defendants have sort of a rote e-mail that they send. We have made a number of Rule 26(f) supplements. We get a document. We provide it. And Mr. Hill has sort of a rote e-mail that says something to the effect that, by timing, form, and substance, you are too late, so we are treating your production as a nullity.

THE COURT: Was this brought to the attention of Magistrate Judge Ellis at that time?

MR. YALOWITZ: Not that I can recall at that time, your Honor, no.

MR. HILL: Your Honor, we did raise the late production of these military files with Judge Ellis. He indicated that he would wait until the record was developed at a deposition.

THE COURT: That was at what point in time?

MR. HILL: When they were done in early 2013.

THE COURT: Before the deposition?

MR. HILL: Yes, sir.

THE COURT: Soon after the production?

MR. HILL: Yes, your Honor.

THE COURT: Let me look at that.

MR. HORTON: Your Honor, there is one other thing.

Mr. Hill just referred to the record of the depositions. Mr. Yalowitz referred to Mr. Sfard, who is their expert. Judge Kaufman, our expert, was actually asked by them at his deposition, could we have gotten these documents if we had gone to the military court. He said yes. If you made the proper application to the military court, you will get them.

Their complaint is, they went through the Hague convention and apparently never heard anything again. We don't know if they did anything to follow up with that. But he said, forget about the Hague convention. If you want records from a court, go to the Court and say, may I have the records. That's what we did. That's what they apparently didn't do.

Judge Kaufman, who should be in a better position than anyone to know, because he's a judge of that court, said, if they had gone, they should have been able to get them. They apparently never did that and that's what this is all about.

THE COURT: My attitude would be, if you wanted to join that issue, you could have joined that issue at the time, like respond in that way. That's not the way you responded. In hindsight, that's an argument. But at the time they requested the documents, I assume you gave them a response which wasn't, you can go to the Israeli court and get it yourself. You responded that you had it, you didn't have it, or you had it and wasn't going to give it to them.

MR. HORTON: Our response would have been just like

your example with your neighbor. The neighbor had given us the documents that we had asked for, which was less than every document that the Court had, so we produced them. We didn't respond, we didn't go to them and I don't think the law requires us to go and say, you should ask my neighbor and see if he's willing to give them to you. Our job is to produce what we have. We produced what we have. What we didn't have was publicly available and I don't think any party is ever under an obligation to go get publicly-available documents.

They keep talking about Judge Ellis. I would like to see Mr. Hill point to language where Judge Ellis says, when I say you have to produce a document during fact discovery to rely on it later, I am including not only documents that are normally within one's possession custody and control, but I am adding the additional requirement that you must go out, find documents which are not in your possession, custody, and control and produce those in fact in discovery. He never said that, but Mr. Hill is proceeding as if he did.

THE COURT: My analysis is more basic than that. I think the way you characterized it is, if you didn't have it and they could have gotten it from another source, then there is no violation. Quite frankly, I don't even have to get to the other source part. If you didn't have it, you didn't have it. I don't have to analyze whether they should have tried to get it someplace else. The question is whether you had an

obligation to produce it or you had an obligation to go out and get it, because it was somehow in your possession, custody, or control. If it wasn't in your possession, custody, and control, my attitude would be that you didn't have an obligation to turn it over until a reasonable time quickly, immediately after it got into your possession, custody, and control.

MR. HORTON: That is exactly our position, your Honor.

THE COURT: Unless they can convince me that you should have, as I say, rather than they have to jump through hoops, you should have jumped through hoops to get it for them.

MR. HORTON: That's a good description.

THE COURT: I will see at what point how you responded and at what point was it reasonable for you to understand that you would want to utilize these documents and whether or not you produced these documents in a timely manner after you obtained these documents or had otherwise custody or control. I don't hear them saying that you misrepresented at this point your response to them when you responded to their request, but I will look at that.

My approach and what the issues that I'm looking at, as I say, let me get through the substantive part first, and also that gives me a real informed framework to know the nature of the witnesses and case on the different incidents so I can make a more informed judgment with regard to each one of those

plaintiff's claims.

I will do that and hopefully on or before the 20th of November we can be in a position to more specifically move forward with regard to resolving as many of these issues as possible so we can stay on the schedule related to trial.

Is there anything else we need to address today by the plaintiffs?

MR. YALOWITZ: I don't think so, your Honor. Thank you very much. This has been a very helpful meeting.

THE COURT: What about defense, anything else?

MR. ROCHON: No, sir. Thank you.

THE COURT: Let's proceed that way. I have a lot of work to do. I have to put aside some other things to stay on the schedule for literally the next six months. I'll try to see if we can all keep up and we can be ready to go and be prepared to pick a jury on January 12.

MR. YALOWITZ: Thank you, your Honor.

o0o